No. 12873.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

Appellant's Reply to Appellee's Memorandum Following Oral Argument.

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Before replying to appellee's "defense in depth," we wish to point out that *Moore v. McDuffie* (9 Cir., 1934), 71 F. 2d 729, 732, cited in appellee's memo (p. 1), does not in any way bear on our contention that the 1948 amendment of the Rules of Decision Act requires the application of state statutes of limitations in equity suits as well as in legal actions based upon federal rights. The *McDuffie* case antedated the Supreme Court decisions in *Erie R. R. Co. v. Tompkins* (1938), 304 U. S. 64; *Ruhlin v. New York Life Ins. Co.* (1938), 304 U. S. 202; *Guaranty Trust Co. v. York* (1945), 326 U. S. 99; and *Holmberg v. Armbrecht* (1946), 327 U. S. 392, all of which are discussed in Appellant's Reply Brief, pages 8-10. Judge Garrecht's decision in the *McDuffie* case can have no real bearing upon the question as to whether *Holmberg v. Armbrecht* was in effect overruled by the 1948 amendment to the Rules of Decision Act.

We now turn to the principal subject of appellee's memo.

The Applicable Period of Limitations Is the Three-Year Period of Section 338(1) of the California Code of Civil Procedure and Not the Four-Year Period of Section 343 of That Code.

Despite appellees' positive assertion to the contrary, there *are* square holdings by California courts that reinstatement actions based on California statutory provisions are barred by the three-year limitation period specified in Section 338(1) of the California Code of Civil Procedure.

In *Harby v. Board of Education,* 2 Cal. App. 418 (83 Pac. 1081),[1] the action to compel the admission of the petitioner to a position as vice principal of a school was brought three years and seven months after her removal therefrom. The defendants demurred to the complaint on the basis of the two-year limitation period specified in Code of Civil Procedure, Section 339(1), and the three-year limitation period of Code of Civil Procedure, Section 338(1), and the trial court sustained the demurrer. The judgment for the defendants was affirmed on appeal, and instead of relying on Section 338(1) as a mere "additional ground" for its decision, as appellee says, the appellate court said (2 Cal. App. at pp. 419-420 [83 Pac. at pp. 1081-1082]):

> ". . . *We think the action is barred by the provisions of subdivision 1, section 338 of the Code of Civil Procedure.* That the statute runs against applications for writs of mandate cannot be disputed, and it commences to run when the claimant is first deprived of his right. (*Barnes v. Gilde,* 117 Cal.

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[1]Cited in Appellant's Opening Brief, pp. 29, 35; Appellant's Reply Brief, p. 12; and Appellant's Brief in Answer to Brief of United States as *Amicus Curiae,* p. 10.

1 [59 Am. St. Rep. 153, 48 Pac. 804]; *Barber v. Mulford,* 117 Cal. 356 [49 Pac. 206]; *Jones v. Police Commrs.,* 141 Cal. 96 [74 Pac. 696].)

"The liability of the defendants to this action depends upon the provisions of section 1793 of the Political Code. If it were not for such statute the board of education would have the right to transfer or remove teachers, being answerable only in damages for a violation of contract in cases of employment for a fixed period. (*Kennedy v. Board of Education,* 82 Cal. 483 [22 Pac. 1042].) *It is only by virtue of the provisions of the statute that the teacher has a right to be protected from removal, or that any liability to this action exists against the defendants. The relief demanded by plaintiff is derived from the statute, and would have no existence if it were not for the statute. The action is upon a liability created by statute, and is therefore barred in three years.*

. . .

"We are also of the opinion that plaintiff's right of action is barred by laches. She did not bring this action for more than three and one-half years after she was removed from the position she claims. . . ."[2]

Thus, the applicability of Section 338(1) was a clear alternative ground for the holding in the *Harby* case and was not a mere makeweight or afterthought used to support the decision that the action was barred by laches.

Another square holding that Section 338(1) is applicable to a reinstatement action is found in *Wittman v.*

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[2]Emphasis here, as elsewhere in this brief, is supplied unless otherwise noted.

Board of Police Commissioners, 19 Cal. App. 229 (125 Pac. 265). That was an action to compel reinstatement of the petitioner as a police captain. The action was filed three years and sixteen days after the petitioner's dismissal from his position. The defendants pleaded the three-year limitation period of Section 338(1) as a bar to the action, and the court held unequivocally that that particular statute was applicable and barred the action. There was no discussion of laches, and the bar of Section 338(1) was the sole ground for the decision.

Still another square holding that Section 338(1) applies to a reinstatement action appears in *Mayer v. Board of Police Commissioners,* 136 Cal. App. 534 (29 P. 2d 458), in which a hearing was denied by the California Supreme Court on March 29, 1934. That was an appeal by the Board of Police Commissioners from a judgment directing that petitioner be reinstated as a policeman, and that he be paid accrued salary from the date of his suspension. The appellate court reversed the judgment, holding that the action was barred by the three-year limitation period of Code of Civil Procedure, Section 338, and specifically stating that laches had *not* been shown to exist.

Additional authorities to the same effect are: *Curtin v. Board of Police Commissioners,* 74 Cal. App. 77 (239 Pac. 355), where the delay was three years and ten months and where the court held the action barred by Section 338(1) and by laches; and *Leahey v. Department of Water and Power,* 76 Cal. App. 2d 281 (173 P. 2d 69), hearing denied by the Supreme Court November 25,

1946, where there was sixteen years' delay in seeking reinstatement, but where the court clearly held that the applicable statute of limitations was Section 338(1), saying (76 Cal. App. 2d at p. 286, 173 P. 2d at p. 72):

> ". . . An application for a writ of mandate to compel the reinstatement of a public official who has been dismissed is barred by the statute unless the proceeding is commenced within three years after the dismissal. (Code Civ. Proc., §338, subd. 1 . . .)
>
> ". . . The nature of the right sued upon, and not the form of the action or the relief demanded, determines the applicability of the statute of limitations. (Citing cases.) Respondent is endeavoring to enforce a liability claimed to have been created in his favor by the city charter, save for the existence of which no relief would be possible and this action would not have been brought. A charter is a statute of the state (citing cases) and an action thereunder is governed accordingly."

Thus, while it is true that the seven-year period of delay in *Jones v. Board of Police Commissioners,* 141 Cal. 96 (74 Pac. 696), made it unnecessary for the court there to choose between Section 338(1) and Section 343, the above cases constitute a complete answer to the appellee's challenge. They show conclusively that there is no merit in his contention that the three-year period of Section 338(1) is inapplicable and that this action was timely because it was brought within the four-year limitation period of Section 343 of the California Code of Civil Procedure.

Appellee's position appears to be that Section 343 applies "to all suits in equity not strictly of concurrent cog-

nizance in law and equity," and that this statutory action for reinstatement and damages is such an exclusively equitable suit. Such position is fallacious because it ignores the foregoing cases and because it misinterprets the general scheme of the California limitations statutes under which specific statutes apply equally to actions at law and to suits in equity.

Although we have doubt that this action is exclusively equitable in character,[3] it is clearly no more "exclusively equitable" than is an action for reinstatement of a police officer or school teacher under a California statute conferring that right. And the cases cited above show conclusively that reinstatement actions of the latter sort are barred by the three-year period of Section 338(1).

The general scheme of the California limitations statutes further shows the inapplicability of the four-year period of Code of Civil Procedure, Section 343. That section follows a series of sections (commencing with Section 335 and including Section 338(1) upon which we rely), each of which specifies a different limitation period depending upon the subject matter in controversy and the nature of the particular right sued upon. Section 343 is a catch-all which provides:

> "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

The fact is that California statutes of limitation have always applied equally to actions at law and to suits in equity and that Section 343 applies only where no other

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[3]See Appellant's Reply Brief, page 7, and Appellant's Brief in Answer to Brief of United States as *Amicus Curiae,* page 2.

limitation period is specifically applicable. In determining the applicable statute in any given case, the inquiry is not as to whether the action is legal or equitable, but rather is whether the action of either type falls within the purview of one of the specific limitation statutes or falls within the catch-all provision for want of an applicable specific provision. In *Lord v. Morris,* 18 Cal. 482, Chief Justice Field said (pp. 486-487):

> "The Statute of Limitations of this State differs essentially from the statute of James I., and from the Statutes of Limitation in force in most of the other States. Those statutes apply in their terms only to particular legal remedies, and hence Courts of Equity are said not to be bound by them except in cases of concurrent jurisdiction. In other cases Courts of Equity are said to act merely by analogy to the statutes, and not in obedience to them. . . . *The case is entirely different in this State. Here the statute applies equally to actions at law and to suits in equity. It is directed to the subject matter and not to the form of the action, or the forum in which the action is prosecuted.* Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties. Thus the statute requires an action 'upon any contract, obligation, or liability founded upon an instrument of writing,' except a judgment or decree of a Court of a State or Territory, or of the United States, to be commenced within four years after the cause of action has accrued. *It matters not whether damages be sought for a breach of the contract, and thus an action at law be brought, or a specific performance*[4]

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[4]Pomeroy classifies an action for specific performance as one of exclusively equitable cognizance. (1 Pomeroy's Equity Jurisprudence, 5th Ed., Section 138, pp. 189-190.)

be prayed, and thus a suit in equity be commenced, the proceeding must in either case be taken within the limitation designated. (See *Pearis v. Covillaud,* 6 Cal. 617.) The statute, after prescribing certain periods within which actions upon judgments, upon simple contracts, for relief on the ground of fraud, and for other causes, shall be brought, declares, in general terms, that 'an action for relief' not thus provided for must be commenced within four years after the cause of action shall have accrued—covering all cases where equitable or other relief may be sought."

This principle is further illustrated in *Boyd v. Blankman,* 29 Cal. 19, where an equitable action to establish and enforce a trust on the ground of fraud was held to be within the purview of the three-year statute of limitations applicable to actions for relief on the ground of fraud, rather than the longer period of the catch-all statute. The court there said at page 44:

> "The defendant relies on the Statute of Limitations as a defense to the action. The statute is applicable alike to all causes of action—to a cause of action in equity as well as one at law. The statute governing this case is found in the fourth subdivision of division third of section seventeen of the act concerning the limitations of civil actions, which is as follows: 'Within three years . . . an action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.' . . ."

The United States Supreme Court long ago recognized this operation of the California statutes of limitations in

Case of Broderick's Will, 21 Wall. 503. That was a suit in equity to set aside the probate of a will in California on the ground that it was a forgery. The Supreme Court held that a court of equity had no jurisdiction to avoid a will on the grounds of fraud or forgery, that being within the exclusive jurisdiction of the probate courts, and observed at page 518:

> "But even admitting that, as to surplus proceeds, and property undisposed of, or acquired by those having actual knowledge of the fraud, the complainants might come into a court of equity on the ground of their own ignorance of the events when they transpired, they would still have to encounter the statute of limitations, which expressly declares that action for relief on the ground of fraud can only be commenced within three years; and the statutes of limitation in California apply to suits in equity as well as to actions at law. . . ."

The cases relied upon by appellee do not support his contention that the catch-all Section 343 applies to all exclusively equitable actions.

Freeman v. Donohoe, 65 Cal. App. 65 (223 Pac. 431), relied on by appellee, was an equitable action for an accounting and settlement of a partnership. The court considered the various specific limitation statutes contained in the Code of Civil Procedure and concluded that the action did not fall within the purview of any of those specific sections, and hence that the only applicable statute was the four-year catch-all provision of Section 343. The language quoted by appellee from that case (at p. 2 of Appellee's Memorandum) was in fact quoted by the court there from the decision in *Piller v. Southern Pacific Company,* 52 Cal. 42, in which case that language was pure

dictum. The *Piller* case was a legal action for damages for personal injury based upon negligence, and the court held that the action was barred by the two-year period of Section 339, as it then stood, rather than by the four-year period of the catch-all Section 343.

In *Moss v. Moss,* 20 Cal. 2d 640 (128 P. 2d 526), also cited by appellee, the court simply held that an action for cancellation of an agreement was governed by Section 343 after concluding that no other section of the code expressly applied to such an action. This is apparent from the following language of the court (p. 644):

> ". . . although there is no section of the code that expressly limits the time within which an action must be brought for cancellation of an instrument because of its illegality, Section 343 of the Code of Civil Procedure provides that 'An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.' . . ."

In the light of the square holdings by the California courts in reinstatement actions and of the general scheme and theory of the California statutes of limitation as set forth in the above authorities, there can be no question but that an action for reinstatement on the basis of a statutory right is governed by the three-year limitation period of Code of Civil Procedure Section 338(1) and does not fall within the four-year catch-all provision of Section 343.

Respectfully submitted,

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